

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Blayne K. Brisson, Petitioner, vs. City of Hewitt, Respondent.	PREHEARING ORDER AND PROTECTIVE ORDER
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A telephone prehearing conference in this matter was held on January 13, 2010.

The Petitioner Blayne K. Brisson appeared on his own behalf. Jana O'Leary Sullivan and Daniel T. Carlisle appeared on behalf of the Respondent City of Hewitt (the Respondent or the City).

The parties stipulate that Petitioner is an honorably discharged veteran for purposes of Minn. Stat. §§ 197.447 and 197.46 (the Veterans Preference Act or VPA). It is not disputed that the City is a political subdivision of the State of Minnesota.

The City Council terminated the Petitioner's employment as the City's only full-time utility and maintenance employee for misconduct. It did not provide the Petitioner with written notice of any right under the VPA to request a hearing within 60 days of his termination. The City asserts that the Petitioner was a department head and therefore not entitled to the protections of the VPA. The Petitioner asserts that he was not a department head.

Based upon the discussion and agreements reached during the prehearing conference, the Administrative Law Judge makes the following:

ORDER

Pursuant to Minn. Stat. §§ 13.03, subd. 6; and 14.60, subd. 2, it is ordered that:

Bifurcation

The issue of whether the Petitioner was a department head shall be bifurcated from other issues in this matter. The hearing on January 28, 2010, will be for the purpose of taking evidence and argument regarding the department head issue.

If the ALJ concludes that Petitioner was a department head, he will recommend that conclusion to the Commissioner of Veterans Affairs along with a recommendation for dismissal. If the ALJ concludes that Petitioner was a not department head, he will promptly set this matter for a further evidentiary hearing to take evidence and argument on the following issues:

1. Whether the Petitioner was incompetent or committed misconduct within the meaning of Minn. Stat. § 197.46 justifying removal from his position with the City.
2. Whether the Petitioner is entitled to reinstatement, back pay, and benefits before or after the discharge hearing, and any offsets to which the City may be entitled.¹

Discovery

The City intends to call its Mayor and its City Clerk as witnesses. The Petitioner intends to call no witnesses other than himself. If the parties intend to call any other witnesses, they shall so notify the Administrative Law Judge and the other party by January 20, 2010.

The parties shall provide copies to each other of all exhibits they intend to introduce by January 20, 2010.

Protection of Not Public Data

Some of the exhibits to be provided by the City may contain personnel data that is not public. The City shall annotate any such exhibits with indications of the contents that are not public.

Disclosure of not public data is permitted in the course of this matter, but is limited to parties, counsel of record, employees assisting counsel, and representatives and witnesses of the parties to the extent necessary to prepare and present claims and defenses or as required by further order.

The Petitioner and any counsel, representatives, or witnesses may not disclose any not public data encompassed by this order to persons other than those mentioned above and must return all not public data released pursuant to this order to counsel for the City at the conclusion of this matter.

¹ A veteran who is involuntarily removed from his position by a public employer without first receiving the written notice and hearing is entitled to reinstatement and back pay from the date of his removal until properly discharged in accordance with the Veterans Preference Act. *Mitlyng v. Wolff*, 342 N.W.2d 120, 123 (Minn. 1984) (holding VPA entitles a veteran to be paid until discharge occurs.); *Tombers v. City of Brooklyn Center*, 611 N.W.2d 24, 26 (Minn. App. 2000); *Pawelk v. Camden Township*, 415 N.W.2d 47, 51 (Minn. App. 1987); *Henry v. Metropolitan Waste Control Commission*, 401 N.W.2d 401 (Minn. App. 1987).

The hearing in this matter is presumed open. If there is testimony or exhibits involving not public data, that portion of the hearing shall be closed or other arrangements made to prevent the public release of not public data.

The not public data encompassed by this order may be used only in this proceeding and not for any other purpose including collateral litigation, unless otherwise ordered by a court of law.

Dated: January 15, 2010

/S/
STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

In the Notice of Petition and Order for Hearing, the Commissioner directed that:

... a contested case hearing concerning the above entitled matter will be held ... to determine whether Petitioner's veterans preference rights, as granted under MN Stat. 197.46 have been denied. If the OAH Judge does determine that the stated veterans preference rights were **NOT** violated and/or denied, the OAH Judge may provide a RECOMMENDATION that the Commissioner should DISMISS the Petition and Order.

If the OAH Judge does determine the stated veterans preference rights were violated and/or denied, the OAH Judge is to continue the Veterans Preference Hearing and provide the Commissioner a RECOMMENDATION whether the Petitioner's requests, as stated or related to the Petition, should be DENIED or Granted, with each Denied or Granted Item so specified.

The ALJ understands that the change in language resulted from a change in precedent set forth in a Commissioner's Order dated December 9, 2008, in *Sandven v. Redwood County*, OAH Docket No. 43-3100-19712-2, in which the Commissioner remanded the proceeding to the ALJ "for an evidentiary hearing regarding the other issues apparently in dispute, including whether Respondent could discharge Petitioner and what relief, if any, Petitioner is entitled to." Thus, it is the position of the Commissioner that the discharge hearing that the municipality failed to provide must be conducted by the Administrative Law Judge.

In this case, the City has raised the defense that the Petition was a department head. Because the evidence on that issue is mostly distinct from evidence on the merits of the discharge, it is most efficient to bifurcate the issue and determine it first.

S.M.M.